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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1061

W. W. HINCHLIFFE, *Petitioner*,

vs.

THE TEXAS COMPANY, THE OHIO OIL COMPANY, AMERADA PETROLEUM CORPORATION, DEEP ROCK OIL CORPORATION

BRIEF FOR RESPONDENT, THE OHIO OIL COMPANY, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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BRIEF FOR RESPONDENT, THE OHIO OIL COMPANY, IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Opinion Below

The only court to write an opinion in this case was the Court of Civil Appeals for the Third Supreme Judicial District of Texas; its opinion is reported in 182 S. W. (2d) 368.

Jurisdiction

Petitioner claims jurisdiction under Judicial Code, Section 237(b); 28 U.S.C.A., Section 344(b). This respondent submits, as will appear from the follow-

ing Summary of the Argument, that no jurisdiction exists because no Federal question is presented by petitioner.

Statement of the Case

This litigation involves the validity of an order entered by the Railroad Commission of Texas allowing petitioner to drill two wells on his L. J. Pinkston lease in the East Texas oil field. The order was entered under the Commission's rule, known as Rule 37, regulating the spacing of wells in the field. The pertinent portion of the rule reads: "No well for oil or gas shall hereafter be drilled in said East Texas Field nearer than 660 feet to any other completed or drilling wells on the same or adjacent tract or farm; and no well shall be drilled in said field nearer than 330 feet to any property line, lease line or subdivision line; provided that the Commission in order to prevent waste, or to prevent the confiscation of property will grant exceptions to permit drilling within shorter distances than above prescribed whenever the Commission shall determine that such exceptions are necessary either to prevent waste or to prevent the confiscation of property" (R. 5).

Since the foregoing rule was promulgated many permits issued by the Commission under the exception clause of the rule authorizing their issuance "to prevent waste" have been attacked in the courts, and in many of these cases the owner of the permit has sought to sustain it by offering testimony that waste would be prevented by drilling the well in question

and by producing oil therefrom because the more wells that are drilled in the East Texas field, the greater will be the ultimate recovery of oil therefrom. This testimony has been relied on in so many cases that it has acquired a name; it is referred to by the courts as "more wells, more oil" testimony (R. 48).

The highest court of the State has held that a drilling permit issued "to prevent waste" cannot be sustained upon the basis of "more wells, more oil" testimony. The only authority given the Railroad Commission is to promulgate orders to prevent waste, which means that Rule 37, the spacing rule, must rest upon a finding of the Commission that it is, *generally speaking*, necessary to drill wells in the East Texas field 330 feet from lease lines and 660 feet from other wells in order to prevent waste. If this is the finding which supports the rule, "more wells, more oil" testimony constitutes an attack on the finding and hence an attack upon the rule itself. The highest court of the State has held, therefore, that a drilling permit issued "to prevent waste" can only be sustained upon the basis of evidence showing some unusual condition in the area where the well is to be drilled, a condition making the **general** finding of the Commission that wells should be drilled 330 feet from lease lines and 660 feet from other wells inapplicable. "More wells, more oil" testimony does not meet this test since that testimony is to the effect, not that unusual conditions exist in the area involved, but that it is necessary to drill the *entire* field to the greatest possible density in order to recover the greatest possible amount of oil therefrom. *Railroad Commission v. Shell Oil Co.*, 139 Tex. 66, 161 S. W.

(2d) 1022; see, also, opinion of the Court of Civil Appeals in the same case, reported at 154 S. W. (2d) 507; *Trapp v. Atlantic Refining Co.* (Tex. Civ. App.), 169 S. W. (2d) 797, writ of error refused. While there is some intimation in petitioner's brief, pp. 28-29, that the State law was to the contrary until quite recently, the truth is that the rule was first announced in *Railroad Commission v. Marathon Oil Co.* (Tex. Civ. App.), 89 S. W. (2d) 517, writ of error refused,* an opinion handed down long before petitioner sought the permits here involved.

This certiorari proceeding involves a claim by petitioner that he is entitled to sustain his permits upon the basis of "more wells, more oil" testimony; that to deny him such right denies him the equal protection of the laws, in violation of the Fourteenth Amendment.

Summary of the Argument

1. No Federal question is presented as to this respondent by petitioner's Points A, B, C, and D because no such question as to this respondent was raised below or decided below; and because no action of the trial court or of this respondent prevented petitioner from proving as against this respondent the matters which he now claims he should have been

*The refusal by the Supreme Court of Texas of an application for writ of eror amounts not only to an approval of the judgment of the Court of Civil Appeals but to an approval of that Court's opinion. Hamilton v. Empire Gas & Fuel Co., 134 Tex. 377, 110 S. W. (2d) 561; Humble Oil & Refining Co. v. State (Tex. Civ. App.), 158 S. W. (2d) 336, writ refused.

allowed to prove in the trial court. See pp. 6-10, *post.)*

2. No question of the equal protection of the laws or of due process of law is presented by petitioner's Points A, B, C, and D because petitioner does not complain of any action by the State or by any agency of the State. (See pp. 11-13, *post.*)

3. No Federal question is properly presented under petitioner's Points A, C, and D, because the matters relied upon by petitioner to raise such Federal question and pleaded by him in an attempt to raise such question are matters going to the very validity of the Railroad Commission's Rule 37, and consequently, under State law, are matters that must be presented in a suit brought as a direct attack upon Rule 37. Furthermore, petitioner, having obtained his permits to drill under the rule, is, under State law, estopped to contend in this proceeding that the rule is invalid. (See pp. 14-17, *post.*)

4. No Federal question of substance is presented by petitioner's Points A, B, C, and D because the court below found that petitioner has and will produce from his L. J. Pinkston lease without the wells, permits for which are involved in this litigation, all the oil he is entitled to produce therefrom under State law. (See pp. 17-19, *post.*)

5. No Federal question of substance is presented by petitioner's Points A, C, and D because the fact that others may have been granted drilling permits

in violation of law does not, by reason of the equal protection clause, entitle petitioner to sustain permits which are invalid under State law. (See pp. 19-20, *post.*)

6. No Federal question is presented by petitioner's Point B because the action of the courts below is, in so far as the question presented by said point is concerned, supported by a non-federal ground adequate to sustain it. (See pp. 20-22, *post.*)

First Point

No Federal question is presented as to this respondent by petitioner's Points A, B, C, and D because no such question as to this respondent was raised below or decided below; and because no action of the trial court or of this respondent prevented petitioner from proving as against this respondent the matters which he now claims he should have been allowed to prove in the trial court.

Argument

This suit was filed against petitioner and the Railroad Commission of Texas by respondents, The Texas Company, Amerada Petroleum Corporation and Deep Rock Oil Corporation, under Sec. 8, Art. 6049c, Vernon's Texas St. 1936, to cancel an order entered by the Commission allowing petitioner to drill two oil wells on his Pinkston lease (R. 1-14). This respondent intervened, assumed the status of a plaintiff and filed a petition alleging that the order

in question was invalid and praying for its cancellation and for an injunction prohibiting petitioner from exercising any right under it (R. 16, 26-33).

While this respondent is referred to in the pleadings as an "intervener" its rights are not derivative and it stands in the same position it would have occupied had it filed an independent suit. Since Sec. 8 of Art 6049c, Vernon's Texas St. 1936, gives any "interested person affected by . . . any . . . order made or promulgated by the Commission" the right to file a suit to test its validity, the State courts hold that a party intervening in a suit filed to test the validity of such an order cannot be prejudiced by the fact that he did not file an independent suit. *Trapp v. Atlantic Refining Co.* (Tex. Civ. App.), 170 S. W. (2d) 506, 510, writ refused. Consequently the proceeding in the trial court in reality involved two suits that had been consolidated for trial; one suit filed by this respondent, and the other suit filed by the other respondents. The trial court recognized this by entering judgment in favor of each respondent; its judgment provides that respondents "should *each* have judgment as prayed for" (R. 39).

In reply to the pleadings of this respondent petitioner filed what he designated "First Amended Answer of Defendant, W. W. Hinchliffe, to Intervenor Ohio Oil Company's Plea in Intervention" (R. 17). This answer contains numerous exceptions to respondent's petition in intervention and a general denial (R. 17-19). That this is the pleading addressed by petitioner to respondent's petition in intervention is shown by recitals in the judgment that among the "trial pleadings" was "the first amended

original answer of defendant W. W. Hinchliffe to the petition in intervention of The Ohio Oil Company" (R. 38), and by recitals in the judgment that "came defendant W. W. Hinchliffe urging the special exceptions numbered I through X contained in his *first amended original answer to the petition in intervention of intervener The Ohio Oil Company*, and the Court having separately considered each of such special exceptions, it was ordered that each of such special exceptions should be and it was thereby overruled, and said defendant then and there in open court duly excepted to each of the court's rulings upon each of his special exceptions" (R. 38). This answer of petitioner contains no allegations raising in any manner whatsoever as against this respondent the Federal questions attempted to be raised by the pleadings described by petitioner at pages 2-4 of his petition for writ of certiorari, pleadings addressed to the petition filed in the trial court *by the other respondents.*

In the trial court this respondent did not except to the pleadings addressed to it by petitioner; and the trial court did not act upon any exceptions presented by this respondent (R. 38-39). The exceptions which the trial court sustained were exceptions addressed *by the other respondents* to pleadings of petitioner directed at them (R. 38-39).

In his brief filed in the Court of Civil Appeals, in his motion for rehearing in that court, and in his application for writ of error filed in the Supreme Court of Texas petitioner complained of the trial court's action in sustaining special exceptions leveled *by the other respondents* at his pleadings (R. 46-47,

53-54, 57-58). Petitioner did not complain and could not have complained of the trial court's action in sustaining any exceptions directed by this respondent to petitioner's pleadings because this respondent presented no such exceptions.

The Court of Civil Appeals in its opinion considered the trial court's action in sustaining special exceptions filed by the other respondents to petitioner's pleadings and in this connection discussed the Federal questions presented by petitioner (R. 48-49). Irrespective of whether or not that court decided any Federal question as to the other respondents, it is plain that it decided no Federal question *insofar as this respondent is concerned* because no such question was presented to it for decision. The Court of Civil Appeals was called upon to decide two suits which had been consolidated for trial, one suit filed by this respondent and the other filed by the other respondents. What that court had to say concerning the questions petitioner presents here was directed at the case made by the other respondents and petitioner, not *to the case involving this respondent and petitioner.*

From the foregoing it is plain that this Court should not take jurisdiction as to this respondent, first, because no Federal question was raised below as to this respondent; and, second, because no Federal question involving petitioner and this respondent was decided below. *Hiawassee River Power Co. v. Carolina-Tennessee Power Co.*, 252 U. S. 341.

No Federal question could be raised as to this respondent and no contention could be made that a Federal question has been decided in the case in-

volving petitioner and this respondent even if petitioner could show the Court a pleading addressed to this respondent and containing the allegations relied upon by him to raise a Federal question because this respondent leveled no exceptions at petitioner's pleadings (R. 38-39). Consequently, if petitioner has pleaded against this respondent the facts relied upon by him to raise a Federal question, nothing done by this respondent or by the trial court has prevented proof of such facts as to this respondent. Under such circumstances petitioner's failure to prove such facts as against this respondent is not due to any action of the trial court concerning the pleadings but is due solely to petitioner's inability to prove such facts as against this respondent or to his decision not to prove them.

This respondent, in the exercise of an independent right given it by State law has succeeded in obtaining a final judgment canceling petitioner's permits. Even if it could be assumed, contrary to fact, that the Federal grounds of attack asserted by petitioner are substantial and valid as against other respondents, the judgment of the State court awarding this respondent cancellation of the permits would have to stand. The petition presents *no grounds* upon which this Court could properly disturb such judgment.

While this respondent believes, for the foregoing reasons, that its judgment is immune to attack, this respondent, in order that all phases of the case may be considered, presents the following points of argument, all addressed to the board proposition that no Federal question is presented by petitioner as against *any* respondent.

Second Point

No question of the equal protection of the laws or of due process of law is presented by petitioner's Points A, B, C, and D because petitioner does not complain of any action by the State or by any agency of the State.

Argument

Petitioner's Points A, C, and D present the same proposition, that the Railroad Commission has issued numerous drilling permits upon the basis of "more wells, more oil" testimony; that wells drilled under such permits are still producing oil from the East Texas field; and that to deny petitioner the right to sustain his permits upon the basis of "more wells, more oil" testimony denies petitioner the equal protection of the laws. Point B advances the proposition that, since the Commission "has granted permits for the drilling of oil wells to other persons where all the factors and conditions were the same as surrounded the granting of permits to" petitioner, petitioner has been deprived of the equal protection of the laws by the action of the State courts in holding his permits invalid.

No Federal question is presented by the foregoing points because petitioner does not complain of any action by the State or by any agency of the State. The due process and equal protection clauses of the Fourteenth Amendment govern State action or action by an agency of the State; they have no application to the action of private individuals. *Nixon v.*

Condon, 286 U. S. 73, 83. The Railroad Commission is an agency of the State, but petitioner does not complain of any action by the Commission. The Commission granted the permits desired by petitioner, with the consequence that petitioner is satisfied with its action. Petitioner does not complain that the treatment given him by the Commission differs from the treatment given others.

Nor, insofar as the question of equal protection is concerned, does petitioner complain of action by the State courts. Petitioner's pleadings to which exceptions were sustained (R. 22-25) contain no allegation that the treatment given other owners of permits by the courts varies from the treatment given him. He does not allege that the courts have upheld other permits upon the basis of "more wells, more oil" testimony and that to deny him the right to sustain his permits upon the basis of such testimony would discriminate against him. In fact there is not a single allegation in the pleadings involved concerning what action has been taken by the State courts with respect to permits granted others.

Petitioner's complaint comes to this: Other persons have obtained permits upon the basis of "more wells, more oil" testimony and no attacks have been made upon such permits, whereas petitioner, after having secured his permits has been hailed into court by respondents. If this raises any question at all as to discrimination, it raises a question involving the action of individuals. Discrimination, if any, resulting from respondents' action in bringing petitioner into court and from the failure of other interested parties to bring other persons securing

permits into court is not such discrimination as is condemned by the Fourteenth Amendment.

If by any stretch of the imagination petitioner's pleadings could be construed to allege that he has been denied equal protection because the State courts have sustained other drilling permits upon the basis of "more wells, more oil" testimony and have denied him the right to sustain his permits upon the basis of such testimony, his pleadings would raise no Federal question. Petitioner has no vested interest in the principle of *stare decisis*. The fact that the courts may have announced law in his case that is different from the law announced in other cases and that the courts have held his permits invalid, whereas, under similar facts, they have held other permits valid, presents no question under the Fourteenth Amendment. *Brinkerhoff-Faris Co. v. Hill*, 281 U. S. 673, 681; *Fleming v. Fleming*, 264 U. S. 29, 31; *Tidal Oil Co. v. Flanagan*, 263 U. S. 444, 450.

The point here made by this respondent shows that none of the petitioner's points raises a Federal question with the possible exception of that part of Point D which advances the contention that the action of the State courts in holding his permits invalid has resulted in the confiscation of his property. If any such proposition is advanced under Point D, it is fully answered by the opinion of the Court of Civil Appeals that petitioner has produced and will ultimately produce from his lease all the oil he is entitled to produce therefrom under rules of property laid down by the State courts. This question is discussed at pages 17-19, *post*.

Third Point

No Federal question is properly presented under petitioner's Points A, C, and D, because the matters relied upon by petitioner to raise such Federal question and pleaded by him in an attempt to raise such question are matters going to the very validity of the Railroad Commission's Rule 37, and consequently, under State law, are matters that must be presented in a suit brought as a direct attack upon Rule 37. Furthermore, petitioner, having obtained his permits to drill under the rule, is, under State law, estopped to contend in this proceeding that the rule is invalid.

Argument

Petitioner's pleading that the Railroad Commission has granted a number of drilling permits to prevent waste upon the basis of "more wells, more oil" testimony and that he is entitled to sustain his permits upon the basis of the same kind of evidence has, under state law, no place in this litigation, which involves the validity of orders entered by the Railroad Commission *under* the provisions of its Rule 37.

As pointed out at pages 3-4, *ante*, Rule 37 is a valid rule provided it is necessary, generally speaking, to drill wells in conformity with its spacing provisions of 330 feet and 660 feet to prevent waste. If it is true that the more wells that are drilled in the field the greater will be the ultimate recovery of oil therefrom, and waste thereby prevented, Rule 37 is invalid because there is no evidence to support the

finding of the Commission which necessarily must underlie it, the finding that, generally speaking, waste will be prevented by drilling wells in conformity with its spacing provisions. Furthermore, if, as alleged by petitioner, the Commission has construed the rule as authorizing it, or as requiring it, to issue drilling permits under the "waste" exception clause of the rule whenever an applicant for such a permit presents "more wells, more oil" testimony, and if such practical construction of the rule has become a part of it, there is no rule. Under such a state of facts, purely hypothetical, anyone who desires to drill a well and who requests a permit therefor is entitled to the permit as a permit "to prevent waste."

The State law is that a rule of the Railroad Commission cannot be collaterally attacked; that its validity must be tested in a direct proceeding brought for that purpose. *Texas Steel Co. v. Fort Worth & D. C. Ry. Co.*, 120 Tex. 597, 40 S. W. (2d) 78; *Trapp v. Atlantic Refining Co.* (Tex. Civ. App.), 169 S. W. (2d) 797, writ refused. Consequently, the State courts have held that the matters presented by petitioner in the pleadings he relies upon in support of his Points A, C, and D must be presented in a suit brought as a direct attack upon Rule 37; that such matters have no place in a suit involving, not the validity of Rule 37, but of orders of the Railroad Commission entered *under* the provisions of Rule 37. The State courts so held in a case involving allegations identically the same as those relied upon by petitioner here. *Trapp v. Atlantic Refining Co.* (Tex. Civ. App.), 169 S. W. (2d) 797, writ refused.

Consequently petitioner, if desirous of urging the matters relied upon here, must urge them in a suit brought as a direct attack upon Rule 37. He must proceed, if he can, by getting that rule out of the way; in which event he will be free to drill the wells here involved. He is not entitled to proceed by attacking the rule indirectly.

Since the State procedure affords petitioner a method whereby he can urge the matters relied upon by him, and since such method is exclusive, he must follow such procedure, unless it can be said that it has been laid down to defeat the claim of Federal right. *Hartford Life Insurance Co. v. Johnson*, 249 U. S. 490, 493. He has never claimed and does not now claim that the procedure laid down by State law does not afford him adequate protection for his Federal rights.

The wisdom of requiring matters involving the validity of Rule 37 to be presented in a suit directly attacking that rule is apparent. In the first place, any such suit must be filed against the Railroad Commission, which is not even a party to this certiorari proceeding and which was not an adversary of petitioner in the trial court. Quite obviously the Commission is vitally concerned with any litigation involving the validity of its spacing rule.

In the second place, a suit involving the validity of the rule itself should not be complicated by issues concerning the validity of orders entered *under* the rule.

Not only has petitioner failed to follow the exclusive procedure provided by State law for an attack upon Rule 37; he is estopped to attack the rule

in this proceeding. The State law is that a party who induces the Railroad Commission to issue him a drilling permit under either of the exception clauses of Rule 37, thereby affirming the validity of the rule, cannot in a proceeding involving the validity of such permit contend that Rule 37 is invalid. He is estopped to make such contention in such a suit. *Brown v. Humble Oil & Refining Co.*, 126 Tex. 296, 83 S. W. (2d) 935; *Turnbow v. Barnsdall Oil Co.* (Tex. Civ. App.), 99 S. W. (2d) 1096, writ refused.

Fourth Point

No Federal question of substance is presented by petitioner's Points A, B, C, and D because the court below found that petitioner has and will produce from his L. J. Pinkston lease without the wells, permits for which are involved in this litigation, all the oil he is entitled to produce therefrom under State law.

Argument

Irrespective of the matters raised by the pleadings of the petitioner to which exceptions were sustained, only abstract questions are presented here because the court below found, and petitioner makes no complaint of the finding, that petitioner's property rights will be fully protected even though the permits here involved are canceled and the wells drilled thereunder closed in. While it is sometimes claimed that the rule of capture allows the owner of a lease to produce therefrom all the oil he can pro-

duce from such lease through wells drilled thereon, any such rule has, of necessity, been modified by the action of the legislature in conferring upon the Railroad Commission the authority to prevent waste by regulating the drilling of wells in oil fields and the production of oil from such fields. *Brown v. Humble Oil & Refining Co.*, 126 Tex. 296, 83 S. W. (2d) 935.

Since this regulatory power has been conferred upon the Railroad Commission the rule of property in this State has been that the owner of a lease is entitled to produce therefrom an amount of oil equivalent to the oil that originally underlay such lease in recoverable quantities. *Brown v. Humble Oil & Refining Co., supra; Magnolia Petroleum Co. v. Railroad Commission* (Tex. Civ. App.), 93 S. W. (2d) 587, writ refused. The rule is sometimes stated a little differently, that the owner of a lease is entitled to produce oil therefrom on an equal basis with his neighbors. *Shell Petroleum Corp. v. Railroad Commission* (Tex. Civ. App.), 137 S. W. (2d) 797; *Wood v. Gulf Oil Corp.* (Tex. Civ. App.), 147 S. W. (2d) 818. In this litigation the Court of Civil Appeals found that petitioner will, without the wells, permits for which are involved in this litigation, "during the life of the field, produce a quantity of oil equivalent to the amount of oil in place beneath his tract"; and that petitioner, without the wells, permits for which are involved in this litigation, has "an equal opportunity with his neighbors to recover his fair share of the oil or its equivalent underlying his tract." (R. 50.)

It is clear from the foregoing findings of the Court of Civil Appeals that any questions presented here

by petitioner are abstract questions. Irrespective of what has happened, petitioner has not been injured and will not be injured since he has produced and will continue to produce all the oil he is entitled to produce under State law. His property rights have been fully protected.

Fifth Point

No Federal question of substance is presented by petitioner's Points A, C, and D because the fact that others may have been granted drilling permits in violation of law does not, by reason of the equal protection clause, entitle petitioner to sustain permits which are invalid under State law.

Argument

Petitioner's claim that he has been denied equal protection of the laws because others have been granted drilling permits upon the basis of "more wells, more oil" testimony, whereas his permits, which he seeks to sustain upon the basis of the same kind of testimony, have been held invalid, is nothing more nor less than a contention that, since others have violated the law and gotten away with it, petitioner is entitled to do the same thing.

If the Railroad Commission has in fact issued permits to others upon the basis of "more wells, more oil" testimony, the Commission has erred; it has acted illegally. And if those who have received such permits have drilled wells thereunder from which they are now producing oil, because no suits attack-

ing the validity of their permits have been brought, they have drilled wells in violation of the Commission's spacing rule and have gotten away with it. But this does not give petitioner the right to do the same thing. The fact that one citizen may have violated the law and not been brought to justice does not entitle another citizen, by reason of the equal protection clause, to do the same thing. *Saunders v. Lowry*, (C.C.A. 5), 58 Fed. (2d) 158; *Thompson v. Spear*, (C.C.A. 5), 91 Fed (2d) 430, cert. den. 302 U. S. 762; *People v. Montgomery* (Calif.), 117 Pac. (2d) 437, 445-446.

Sixth Point

No Federal question is presented by petitioner's Point B because the action of the courts below is, in so far as the question presented by said point is concerned, supported by a non-federal ground adequate to sustain it.

Argument

Under Point B petitioner contends that to deprive him of his permits would deny him the equal protection of the laws because the Railroad Commission "has granted permits for the drilling of oil wells to other persons where all the factors and conditions were the same as surrounded the granting of permits" to him (Br., p. 22). Petitioner's pleadings raising this question were excepted to by the other

respondents upon the ground, among others, that the matters alleged were "but the legal conclusion of the pleader, no facts being alleged upon which it can be adjudged whether the factors and conditions were all the same; and said allegation is vague and indefinite in that it does not name the other permittees or identify their leases, well numbers or Rule 37 permit numbers, and is too vague and indefinite to apprise plaintiffs of the permits which defendant contends were granted under the same conditions, nor are the conditions referred to by defendant described so that the Court and plaintiffs may know which surrounding conditions defendant refers to; so as to enable plaintiffs to investigate and be prepared to meet issue of proof whether or not such conditions are in fact the same as exist in defendant's lease" (R. 34). This exception was sustained by the trial court (R. 38-39), and the judgment of the trial court was affirmed by the Court of Civil Appeals (R. 51).

It is plain from the foregoing that petitioner's Point B, which seeks to predicate error upon the action of the trial court in sustaining exceptions to his pleadings concerning the granting of permits to others in instances where all the facts and circumstances were the same as in the case of petitioner, presents no Federal question because the trial court's action in sustaining the exceptions, action which was affirmed by the Court of Civil Appeals, is sustainable upon an adequate non-federal ground. If petitioner desired to preserve the Federal question which he attempts to bring forward in Point B, he should have amended his pleadings so as to meet

the trial court's ruling that the pleadings failed to apprise respondents of the facts petitioner intended to prove.

Conclusion

It is respectfully submitted that no Federal question of substance is presented by the petition for writ of certiorari and that the petition should be denied.

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